

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ESTATE OF ARTURO GIRON ALVAREZ *
by and through Maria Ana Giron
Galindo as Administrator *

Plaintiff *

vs. * CIVIL ACTION NO. MJG-15-950

THE JOHNS HOPKINS UNIVERSITY *
et al.

Defendants *

* * * * *

DECISION RE: SECOND AMENDED COMPLAINT

The Court has before it Defendants' Motion Under Federal Rules of Civil Procedure 12(b)(1) and (6) to Dismiss The Second Amended Complaint [ECF No. 107] and the materials submitted relating thereto. The Court has held a hearing and had the benefit of the arguments of counsel.

This case arises out of what is referred to as "the Guatemala Study." From about 1946 to the early or mid-1950s, officials of the United States Public Health Service engaged in nonconsensual medical experimentation in Guatemala and managed to conceal their actions for some sixty years.

In 2010, when the Guatemala Study became known, President Obama called the President of Guatemala "offering profound apologies and asking pardon for the deeds of the 1940s." CNN Wire Staff, *US Apologizes for Infecting Guatemalans with STDs in*

the 1940s, CNN (Oct. 1, 2010).¹ Secretary of State Hillary Clinton and Secretary of Health and Human Services Kathleen Sebelius jointly stated:

We deeply regret that it happened, and we apologize to all the individuals who were affected by such abhorrent research practices.

The conduct exhibited during the study does not represent the values of the United States, or our commitment to human dignity and great respect for the people of Guatemala.

Id.

The United States Government officials' expressions of regret were not followed by any recognition of an obligation to compensate the victims of the Guatemala Study for the injuries they sustained. When a class of Guatemala Study victims sued the United States in federal court in Washington, the Government successfully claimed immunity, and the suit was dismissed in 2012.

In the instant case, a group of 842 plaintiffs, including subjects of the Guatemala Study, their spouses, and descendants, seek recovery from the Johns Hopkins University, the Rockefeller Foundation, and Bristol-Myers (as successor to the pharmaceutical company that supplied penicillin used in the study). Plaintiffs have, so far, filed three successive

¹ <http://www.cnn.com/2010/WORLD/americas/10/01/us.guatemala.apology/>

Complaints seeking to plead plausible claims against these defendants. As discussed herein, none of these three complaints were adequate to do so. However, there is no doubt that at least some of the Plaintiffs suffered injury from the Guatemala Study. Therefore, the Court will not dismiss the case without providing Plaintiffs' counsel - in light of the instant decision - another opportunity to plead legally adequate claims against the Defendants.

I. BACKGROUND

A. The Prior "Guatemala Study" Case (Garcia)

The instant case is the second filed by subjects of nonconsensual medical experimentation conducted in Guatemala from about 1946 to the early or mid-1950s (the "Guatemala Study").

In 2011, a class action was filed on behalf of victims of the Guatemala Study and their heirs, asserting claims against various federal office holders under the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and the United States Constitution.

Garcia v. Sebelius, 867 F. Supp. 2d 125 (D.D.C. 2012), vacated in part, 919 F. Supp. 2d 43 (D.D.C. 2013).

As stated by the Garcia court:

From 1946 to 1953, officials from the United States Public Health Service and the Pan American Sanitary Bureau conducted medical

studies in Guatemala that "involved deliberate infection of people with sexually transmitted diseases ("STDs") without their consent." (the "Guatemala Study"). "Subjects were exposed to syphilis, gonorrhea, and chancroid, and included prisoners, soldiers from several parts of the [Guatemalan] army, patients in a state-run psychiatric hospital, and commercial sex workers." None of the subjects of the Guatemala Study gave "their informed consent to participate," as they were not provided with "information about the procedures or their risks" prior to participating in the study. "Instead of consent from the subjects [housed in institutions], the medical team sought cooperation from the institution[s] in which their prospective subject pool resided" by providing those institutions with "essential supplies, such as epilepsy medication to the mental asylum, malaria medication to the orphanage, and refrigerators for medications."

One of the objectives of the Guatemala Study was "to determine whether penicillin, then a recently-discovered cure for syphilis, could also be used as a prophylaxis." "[A]nother goal was to find the most effective way to inoculate patients with [syphilis]." The study was conducted in Guatemala for several reasons, including that it was "a location where [the medical team could] carry out more invasive methods of inoculation with venereal diseases without ethical scrutiny." "In total, the medical team intentionally exposed nearly 700 people to syphilis, nearly 600 to gonorrhea, and over 100 to chancroid—all serious venereal diseases."

The Guatemala Study "finally came to light in the [F]all of 2010." On November 24, 2010, President Barack Obama issued a letter to the Chair of the Presidential Commission for the Study of Bioethical Issues, noting the recent revelation "that the U.S. Public Health Service conducted research on sexually transmitted diseases in

Guatemala from 1946 to 1948 involving the intentional infection of vulnerable human populations." Acknowledging that "[t]he research was clearly unethical," President Obama directed "the Presidential Commission for the Study of Bioethical Issues to oversee a thorough fact-finding investigation into the specifics of the U.S. Public Health Service Sexually Transmitted Diseases Inoculation Study."

Id. at 130 (internal citations omitted).

The Garcia court held that the individual defendants had absolute immunity from common-law tort claims arising out of acts they took in the course of their official duties, substituted the United States as the defendant, and converted the claims into Federal Tort Claims Act (28 U.S.C. § 1346) ("FTCA") claims. Id. at 136. However, since the plaintiffs' injuries were suffered in a foreign country, their claims were subject to an exception from the FTCA (28 U.S.C. § 2680(k)) and were dismissed. Id. at 137.

The Garcia court further held that, because the individual defendants, federal government officials, had not been personally involved in any violation of the plaintiffs' constitutional rights, no action would lie against them under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Id.

The Garcia court, dismissing all claims, concluded by saying:

As the plaintiffs assert, and the defendants acknowledge, the Guatemala Study is a deeply troubling chapter in our Nation's history. Yet, for the various reasons identified [in the decision], this Court is powerless to provide any redress to the plaintiffs.

Id. at 144.

B. The Instant Case

On April 1, 2015, 774 of the 842 plaintiffs herein, including members of the Garcia class, filed the Complaint [ECF No. 2] in the Circuit Court for Baltimore City. The Complaint presented a "mass action" pursuant to 28 U.S.C. § 1332(d)(11)(b)(i) and was, on that day, removed to federal court. [ECF No. 1].

On June 30, 2015, all 842 plaintiffs herein (collectively referred to as "Plaintiffs"), filed the Amended Complaint [ECF No. 64]. The Amended Complaint presented claims in eleven Counts, nine presumably under Maryland Law,² an ATS claim, and a final Count asserting punitive damages on all other claims.

Following a hearing, the Court dismissed all but the ATS claim and the claim for punitive damages in the Amended Complaint and permitted Plaintiffs to file a Second Amended Complaint. See Order Re: Second Amended Complaint [ECF No. 89].

² There was no reference to the claims being asserted under the law of Guatemala.

On November 30, 2015, Plaintiffs filed the pending Second Amended Complaint [ECF No. 100] asserting claims under Guatemala law, "conditional" claims under Maryland law, and ATS claims. In the Second Amended Complaint, Plaintiffs seek to impose liability upon The Johns Hopkins Hospital, The Johns Hopkins University, The Johns Hopkins University School of Medicine, The Johns Hopkins Bloomberg School of Public Health, The Johns Hopkins Health System Corporation (collectively referred to as "Hopkins"), The Rockefeller Foundation ("Rockefeller"), and Bristol-Myers Squibb Company ("Bristol-Myers") (collectively "Defendants") for harm caused by the Guatemala Study.

The Second Amended Complaint asserts claims in 20 Counts:

- I - Guatemalan Civil Code
- II - Lack of Consent and Lack of Informed Consent
- III - Negligence
- IV - Corporate Negligence
- V - Battery
- VI - Fraud or Deceit by Misrepresentation
- VII - Fraudulent Concealment
- VIII - Intentional Infliction of Emotional Distress
- IX - Unjust Enrichment
- X - Wrongful Death

XI-XIX - Violation of the Law of Nations³

XX - Punitive Damages

By the instant motion, Defendants seek dismissal of all claims against them.

II. DISMISSAL STANDARDS

A. Rule 12(b)(6)

A motion to dismiss filed under Federal Rule of Civil Procedure 12(b)(6)⁴ tests the legal sufficiency of a complaint. A complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the ... claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations omitted).

When evaluating a 12(b)(6) motion to dismiss, a plaintiff's well-pleaded allegations are accepted as true and the complaint is viewed in the light most favorable to the plaintiff. However, conclusory statements or a "formulaic recitation of the elements of a cause of action" will not suffice." Id. A complaint must allege sufficient facts to "cross 'the line between possibility and plausibility of entitlement to relief.'"

³ These nine Counts are duplicative.

⁴ All "Rule" references herein are to the Federal Rules of Civil Procedure.

Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009)
(quoting Twombly, 550 U.S. at 557).

Inquiry into whether a complaint states a plausible claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. Thus, if the well-pleaded facts contained within a complaint "do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not shown - that the pleader is entitled to relief." Id. (quoting Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009)).

B. Rule 12(b)(1)

A party may seek dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). It is well established that "[t]he burden of proving subject matter jurisdiction on a [Rule 12(b)(1)] motion to dismiss is on the plaintiff, the party asserting jurisdiction." Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

III. DISCUSSION

The undersigned Judge agrees fully with Judge Walton of the United States District Court for the District of Columbia who, in Garcia, recognized the despicable nature of the actions of the perpetrators of the Guatemala Study. However, the Second

Amended Complaint does not present a cognizable claim on the part of any Plaintiff against any Defendant.

To plead their claims adequately, Plaintiffs must present sufficient factual allegations regarding (1) "foundationally,"⁵ their individual abilities to present the claims asserted, (2) the existence of claims that, if timely made and adequately pleaded against an appropriate defendant, could be legally cognizable, and (3) the liability of the Defendants.

As discussed herein, the Second Amended Complaint:

- Does not present adequate factual allegations regarding the "foundation" for any particular Plaintiff.
- Adequately pleads an Alien Tort Statute claim that an appropriate Plaintiff could assert against an appropriate defendant.
- Does not present adequate factual allegations to present a plausible claim of liability on the part of any Defendant.

The instant case is a multi-plaintiff action brought by 842 plaintiffs, each presenting his or her separate claims. There are five categories of Plaintiffs:

- "Direct Plaintiffs" - victims directly infected with syphilis in the Guatemala Study.
- "Estates" - Estates of deceased Direct Plaintiffs.

⁵ The term "foundation" is used herein to mean, as to a particular Plaintiff, specific individualized factual allegations to present a plausible claim arising out of the Guatemala Study that the Plaintiff could assert if it were timely filed against a defendant who could be held liable.

- "Spouses" - Spouses claiming they were infected with syphilis, gonorrhea, and/or chancroid by Direct Plaintiffs.
- "Descendants" - Descendants of Direct Plaintiffs who claim they were infected congenitally with a disease passed through one or more generations from a Direct Plaintiff.
- "Wrongful Death Claimants" - Parents, children, and spouses of deceased Plaintiffs whose deaths were caused by the Guatemala Study, asserting wrongful death claims.

A. Plaintiffs

The allegations regarding the 842 Plaintiffs are set forth in ¶ 8⁶ of the Second Amended Complaint, stating:

The Plaintiffs in this case seek compensatory and punitive damages from the Defendants. They include:

- a. Guatemalans who were subjects in the Experiments (the "Subject Plaintiffs") and intentionally and negligently exposed to and infected with syphilis, gonorrhea, and/or chancroid without their actual or informed consent;
- b. Guatemalans who were spouses, children, grandchildren, and great-grandchildren of the Subject Plaintiffs who acquired syphilis, gonorrhea, and/or chancroid through sexual contact with or congenitally from the Subject Plaintiffs;
- c. Descendants of the Plaintiffs who are entitled to prosecute wrongful death claims as a result of the death of their decedents from complications of syphilis, gonorrhea,

⁶ "¶" references herein refer to the Second Amended Complaint unless otherwise specified.

and/or chancroid arising out of the Experiments or through sexual contact with or congenital exposure from the Subject Plaintiffs.

That is the sum total of the "foundation" allegations made in the Second Amended Complaint. The Second Amended Complaint does not adequately plead a factual foundation for any Plaintiff.

1. Direct Plaintiffs

a. Living Plaintiffs

The Second Amended Complaint states, collectively and in conclusory terms, that Direct Plaintiffs were subjects of the Guatemala Study and infected with "syphilis, gonorrhea, and/or chancroid" without consent. There are no plaintiff-specific allegations.

b. Estate Plaintiffs

Although the lead Plaintiff is the Estate of Arturo Giron Alvarez, the Second Amended Complaint, by oversight, does not include Estate Plaintiffs in the statement of Plaintiffs presented in ¶ 8 of the Second Amended Complaint. However, the Second Amended Complaint states in ¶ 202: "Many of the Plaintiffs identified as deceased or entitled 'Estate of' on

Exhibit 1 died from complications caused by the diseases they contracted as a result of the Guatemala Experiments."

But, there are no factual allegations specifying which are among the "many of the Plaintiffs," referred to, identifying the disease on which the claim is based, or presenting a plausible basis for the contention regarding the cause of death.

2. Indirect Plaintiffs

a. Spouses

As to Spouses, the Second Amended Complaint presents allegations that they (or some of them) "acquired syphilis, gonorrhea, and/or chancroid" from a Direct (Subject) Plaintiff. There are no Spouse-specific factual allegations identifying the disease or presenting a plausible claim that the Guatemala Study's infection of the Spouse's wife or husband was a proximate cause of the Spouse's alleged infection.

b. Descendants

i. Claiming Infection

The Second Amended Complaint describes Descendant Plaintiffs as "children, grandchildren, and great-grandchildren of the Subject Plaintiffs who acquired syphilis, gonorrhea, and/or chancroid . . . [congenitally] from the Subject Plaintiffs." ¶ 8. There is no allegation as to any Descendant

Plaintiff specifying the disease on which the claim is based. Nor are there factual allegations presenting a plausible claim that the disease was proximately caused by the Guatemala Study and transmitted through one or more generations to the Descendant Plaintiff.

ii. Wrongful Death Claimants

The Second Amended Complaint purports to state claims for "Descendants of the Plaintiffs who are entitled to prosecute wrongful death claims as a result of the death of their decedents from complications of syphilis, gonorrhea, and/or chancroid arising out of the Experiments or through sexual contact with or congenital exposure from the Subject Plaintiffs." Id.

This group, as described in the Second Amended Complaint, would include children, parents, and spouses of all deceased Plaintiffs, whether the decedent is a Direct Plaintiff, a Spouse, or a Descendant Plaintiff. There are no factual allegations specifying which Plaintiffs are Wrongful Death Claimants in regard to which decedent, a plausible basis for the cause of death contentions, or the identity of all other beneficiaries entitled to a share of the proceeds.

3. The Third Amended Complaint

Plaintiffs may file a Third Amended Complaint that presents claims on behalf of Plaintiffs who plead an adequate foundation to assert the claims.

The Court will not - at the present stage - require the Plaintiffs to provide adequate foundational allegations for all of the 842 Plaintiffs. It will suffice, in the Third Amended Complaint, for Plaintiffs to provide such adequate foundational allegations for at least one Plaintiff in each of the categories set forth below:

- Living Direct Plaintiffs
- Estates of Direct Plaintiffs
- Spouses of Direct Plaintiffs
- First Generation Descendants (children)
- Subsequent Generation Descendants
- Wrongful Death Claimants

By so doing, Plaintiffs will enable the Defendants and the Court to address the ability of actual, rather than hypothetical, plaintiffs to pursue their respective claims.

IV. Plaintiffs' Claims

A. Alien Tort Statute Claims

The Second Amended Complaint presents nine Counts based on the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"):

Count XI - Violation of the Law of Nations
- Crimes Against Humanity (ATS)

Count XII - Violation of the Law of Nations
- Aiding & Abetting Crimes Against Humanity

Count XIII - Violation of the Law of Nations
- Conspiracy to Commit Crimes Against
Humanity

Count XIV - Violation of the Law of Nations
- Cruel, Inhuman, and Degrading Treatment

Count XV - Violation of the Law of Nations
- Aiding & Abetting Cruel, Inhuman, and
Degrading Treatment

Count XVI - Violation of the Law of Nations
- Conspiracy to Commit Cruel, Inhuman, and
Degrading Treatment

Count XVII - Violation of the Law of Nations
- Involuntary and Nonconsensual Medical
Experimentation on Humans

Count XVIII - Violation of the Law of
Nations - Aiding & Abetting Involuntary and
Nonconsensual Medical Experimentation on
Humans

Count XIX - Violation of the Law of Nations
- Conspiracy to Commit Involuntary and
Nonconsensual Medical Experimentation on
Humans

The claims in these Counts are duplicative as was agreed at the motion hearing.⁷ Therefore, the ATS claims to be presented in the Third Amended Complaint shall be stated in a single Count.

1. Jurisdiction

The Alien Tort Statute, enacted in 1980, provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2012).

It appears that all but one⁸ of the Plaintiffs are citizens of Guatemala who may invoke the jurisdiction of the Court⁹ to pursue claims for torts allegedly committed in violation of the law of nations.

Accordingly, the Court shall have jurisdiction over ATS claims presented in the Third Amended Complaint. And, there appears to be no doubt that, in the instant case, the Court

⁷ THE COURT: If I said that the counts were duplicative so that one stood, it wouldn't be doing anything other than cleaning up the complaint, would it? I wouldn't be taking anything away. MR. HOPPER: As long as the nonconsensual human experiment count stays I think it would be the same as the others. Tr. 125. All "Tr." references herein are to the transcript of July 21, 2016.

⁸ Plaintiff 76, Ramiro Anibal Galvez Ortiz, is alleged to be a dual citizen of Guatemala and the United States.

⁹ Assuming that they can present adequate foundational allegations as discussed above.

would have jurisdiction over claims based on Guatemala law asserted in the Third Amended Complaint.

2. The Law of Nations

The Second Amended Complaint presents allegations adequate to present a plausible claim that the perpetrators of the Guatemala Study conducted medical experimentation on nonconsenting human subjects.

This Court finds, as stated by the United States Court of Appeals for the Second Circuit in Abdullahi v. Pfizer, Inc.:

[Plaintiffs] have pled facts sufficient to state a cause of action under the ATS for a violation of the norm of customary international law prohibiting medical experimentation on human subjects without their consent. In such an instance, ATS jurisdiction exists over plaintiffs' claims.

562 F.3d 163, 187 (2d Cir. 2009).

Thus, the Court would have jurisdiction to hear an ATS claim based on the Guatemala Study asserted by any Plaintiff presenting adequate foundational allegations.

3. The Ten-Year ATS Limitations Period

The ATS does not expressly provide for a limitations period. Prior to the 1991 enactment of the Torture Victims Protection Act, 28 U.S.C. § 1350 ("TVPA"), federal courts sought to apply limitations for the closest analogous state court

torts. See, e.g., Jama v. U.S.I.N.S., 343 F. Supp. 2d 338, 365 (D.N.J. 2004). However, “[e]very circuit to consider the issue since [the 1991 TVPA] has applied the ten-year statute of limitation found in the TVPA to claims brought under the ATS.” John N. Drobak, *The Alien Tort Statute from the Perspective of Federal Court Procedure*, 13 WASH. UNIV. GLOBAL STUD. L. REV. 421, 433 (2014). See also Chavez v. Carranza, 559 F.3d 486, 492 (6th Cir. 2009) (“Like all courts that have decided this issue since the passage of the TVPA, we conclude that the ten-year limitations period applicable to claims under the TVPA likewise applies to claims made under the ATS.”); Doe v. Rafael Saravia, 348 F. Supp. 2d 1112, 1146 (E.D. Cal. 2004) (“Although there is no express limitation period prescribed by the [ATS], the Ninth Circuit has held the applicable limitations period to be the 10-year period set out in the TVPA.”).

Plaintiffs contend, and some commentators state,¹⁰ that no limitations should apply to a violation of customary international law. However, absent judicial authority to the contrary, the Court shall accept the judicial consensus that there is a ten-year period of limitations pertinent to Plaintiffs’ ATS claims.

¹⁰ See Drobak, supra, at 433 n. 55 (stating that “a few critics have rejected the ten-year statute of limitations and relied on customary international law in determining that a statute of limitations should not be implemented”).

4. Liability and Responsibility Issue Overlap

Defendants' contention that the Plaintiffs' claims against them are untimely is, in part, overlapping with the contention that they cannot be held liable for the violation of the law of nations on which the ATS claims are based. Defendants may well have valid positions regarding their liability.

However, for purposes of the present discussion regarding timeliness, the Court will assume that Plaintiffs could, in a Third Amended Complaint, adequately plead plausible claims of Defendants' liability and responsibility for the Guatemala Study perpetrators' tortious conduct and concealment.

5. Commencement Date

The initial question presented is, as to each Plaintiff, the date upon which the ten-year limitations period commences. This question will be resolved in the context of the allegations in the Third Amended Complaint and the parties' legal arguments made relating thereto. However, it will be useful to address these matters preliminarily prior to the filing of the Third Amended Complaint.

a. Direct Plaintiffs (and their Estates)

As to each Direct Plaintiff (and his/her Estate), the ten-year period could be considered to commence, among other possible dates, on the date:

- The Direct Plaintiff was infected in the Guatemala Study with the disease relied upon,
- The disease manifested itself in that Direct Plaintiff,
- The Direct Plaintiff knew, or should have known, he/she had the disease, or
- The Direct Plaintiff (or Estate) was on "Inquiry Notice"¹¹ that there was a possible causal connection between that Direct Plaintiff's disease and the Guatemala Study, either by virtue of the September 2011 release of the report of the United States Presidential Commission for the Study of Bioethical Issues or otherwise.

b. Indirect (Spouse and Descendant) Plaintiffs

As to each Spouse and most¹² Descendant Plaintiffs ("Indirect Plaintiff") claiming that he/she was infected with a disease proximately caused by a Guatemala Study infection of a Direct Plaintiff, the ten-year period could be considered to commence, among other possible dates, on the date:

¹¹ The term "Inquiry Notice" is used herein only as a "placeholder" label to refer generally to those circumstances that would, in the context of the instant case, justify the commencement of the ATS limitations period for a plaintiff. The Court shall, in due course, address the matter more fully as presented in regard to the anticipated Third Amended Complaint.

¹² Some Descendant Plaintiffs may have been born sufficiently recently to present no timeliness issues.

- The Direct Plaintiff was infected,
- The Indirect Plaintiff was infected,
- The disease manifested itself in the Indirect Plaintiff,
- The Indirect Plaintiff knew, or should have known, he/she had the disease, or
- The Indirect Plaintiff knew, or was on "Inquiry Notice" that the disease was connected with the Guatemala Study either by virtue of the September 2011 release of the report of the United States Presidential Commission for the Study of Bioethical Issues or otherwise.

c. Wrongful Death Plaintiffs

The Second Amended Complaint asserts wrongful death claims, "conditionally" based on the Maryland Wrongful Death Act, on the part of each Plaintiff who is a spouse, child, or parent of any other Plaintiff (Direct or Indirect) who claims to have been infected by the Guatemala Study. As discussed below, the Court finds that Plaintiffs cannot assert a claim based on the aforesaid Maryland statute.

If the Third Amended Complaint should present a wrongful death type claim¹³ under the ATS that could be viable,¹⁴ the ten-

¹³ That is, a claim under the ATS on behalf of a parent, child, or spouse for damages resulting from the death of a deceased child, parent, or spouse.

¹⁴ The Court is not here finding that any such claim would be valid.

year period could be held to commence, among other possible dates, on the date:

- The Direct Plaintiff who obtained the disease from the Guatemala Study was infected,
- The Decedent (if not that Direct Plaintiff) was infected,
- Of the death of the Decedent proximately caused by the Guatemala Study, or
- The Wrongful Death Plaintiff knew, or was on "Inquiry Notice" that the death of the Decedent was proximately caused by the Guatemala Study either by virtue of the September 2011 release of the report of the United States Presidential Commission for the Study of Bioethical Issues or otherwise.

6. Equitable Tolling

Plaintiffs contend their claims would be timely even if the ATS limitations commencement date were held to be more than ten years prior to their filing date. They contend that the running of limitations on their ATS claims should be equitably tolled.

"Equitable tolling applies where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action." English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987).

The Court shall, in due course, address any equitable tolling issues presented in the context of the claims in the anticipated Third Amended Complaint and materials submitted in regard to a motion seeking dismissal of claims as time-barred.

B. Guatemala Law Claims

In Count I, Plaintiffs assert claims under Section 2277 of the 1933 Guatemalan Civil Code and Sections 1645 and 1646 of the 1963 Guatemalan Civil Code. The parties have presented conflicting expert reports regarding the law of Guatemala. However, as discussed in the motion hearing, the claims under Guatemala law are moot with regard to Plaintiffs who can assert claims under the ATS. That is, Plaintiffs who can present claims for violations of the law of nations do not assert any claim under Guatemala law that is not available to them equally, or more favorably, under their ATS claim.¹⁵

Only one Plaintiff (No. 76), Ramiro Anibal Galvez Ortiz,¹⁶ a United States citizen, cannot proceed with an ATS claim.¹⁷

¹⁵ THE COURT: Okay. What greater recovery is there for the -- a plaintiff under either Maryland law or the law of nations than would be possible under Guatemala law? Frankly, I don't see that there is any, but you tell me.

MR. BEKMAN: Our position is there isn't. Tr. 9.

. . . .

THE COURT: . . . is there any contention that any plaintiff is better off under Guatemalan law than ATS law, so that we even have to discuss Guatemalan law? I don't think [so but] I just want to make sure I'm not passing over something, but it doesn't seem to me to be relevant here.

MR. PERLIN: Your Honor it's not that we, that the plaintiffs contend that Guatemalan law is better for any plaintiff than the ATS, but at the same time we are not abandoning our claims under Guatemalan law. Tr. 144.

¹⁶ Plaintiff 76, Ramiro Anibal Galvez Ortiz, is alleged to be a dual citizen of Guatemala and the United States.

¹⁷ MR. HOPPER: It's our understanding [he is] a descendant, Your Honor, it's neither a direct or spouse.

THE COURT: Okay. Now, we agree that person can't sue under the Alien Tort Statute.

Therefore, as to him, claims under Guatemala Law are not moot. The Second Amended Complaint does not present adequate allegations regarding the foundation for Plaintiff Ortiz to assert any such claims. If Plaintiff Ortiz (No. 96) adequately presents foundational allegations in the Third Amended Complaint and asserts claims under the law of Guatemala, the Court will consider the validity of such claims. The Court notes, however, that Defendants have presented non-frivolous contentions regarding Guatemala law that Plaintiffs should be prepared to address. These relate to:

- Timeliness,
- Recognition of preconception torts,
- Extent of vicarious liability,
- Meaning of "immediate and direct injury," and
- The scope of damages.

C. "Conditional" Maryland Law Claims (Counts II-IX)

Each of Counts II through IX commences with an introduction that states that unless the claims are cognizable under the law of Guatemala, the Court must apply Maryland law. For example,

[t]o the extent that Guatemalan law does not provide a remedy for the allegations set forth in this Count, or to the extent that Guatemalan choice of law

MR. HOPPER: We do agree. Tr. 143.

principles require the application of the doctrine of renvoi, Plaintiffs assert that Maryland law applies and permits this Court, including under the public policy, common sense, or other exceptions to the principle of lex loci delicti.

¶ 138.

In regard to renvoi,¹⁸ Defendants state:

As Professor Rosenn explains, Guatemala enacted in 1929 and continues to follow the Bustamante Code, an international convention on choice-of-law rules. Rosenn Supp. Decl. ¶ 15. That Code was written by an authority who opposed the doctrine of renvoi and wrote it out of the law. Id. ¶ 16. As a result, Guatemala also applies what we call lex loci delicti to tort claims. Id. ¶ 17 (quoting Bustamante Code Art. 168); see also id. (quoting Bustamante Code Art. 167 regarding civil claims arising from criminal conduct). There is no basis for application of renvoi to this case.

Memorandum of Law In Support of Defendants' Motion Under Federal Rules of Civil Procedure 12(b)(1) and (6) to Dismiss The Second Amended Complaint [ECF No. 107] at 11.

Plaintiffs do not provide any reasonable basis for finding that renvoi would be applicable herein.

¹⁸ "Renvoi refers to the phenomenon where the forum court's choice-of-law rules point to application of foreign law, but the foreign body of law includes its own choice-of-law rules that would point back to the forum or another jurisdiction." Memorandum of Law In Support of Defendants' Motion Under Federal Rules of Civil Procedure 12(b)(1) and (6) to Dismiss The Second Amended Complaint [ECF No. 107] at 11 (citing E. Stainless Corp. v. Am. Prot. Ins. Co., 829 F. Supp. 797, 799-800 (D. Md. 1993)).

The Court does not accept Plaintiffs' contention that the Court must, or a Maryland court would, apply Maryland law on "public policy" grounds as they contend. To do as Plaintiffs suggest would constitute a disregard of the principles of lex loci and would infuse Plaintiffs' repetition of the mantra "public policy" with substance that it lacks.

Plaintiffs are citizens of Guatemala, suing under the law of Guatemala for injuries inflicted in Guatemala. Plaintiffs do not refer to any decision by a Maryland Court in which Maryland public policy was utilized for the benefit of a party not a citizen or resident of Maryland. Plaintiffs refer to a single federal¹⁹ case, in which the judge found that Maryland public policy warranted - for the benefit of a District of Columbia defendant - applying Maryland's procedural rule regarding the filing of a medical malpractice case. Lewis v. Waletzky, 576 F. Supp. 2d 732, 735 (D. Md. 2008), aff'd, 475 F. App'x 906 (4th Cir. 2012) ("The Maryland Health Claims Act reflects Maryland's strong public policy that medical malpractice claims alleging damages in excess of a certain jurisdictional amount should be subject to arbitration and other prerequisites prior to being litigated in court.").

¹⁹ THE COURT: I gather the only case [in which Maryland public policy was applied for the benefit of a non-Maryland party] is a 2008 decision by Judge Messitte involving a medical malpractice case, right?

MR. BEKMAN: That is correct, Your Honor. Tr. 11.

Plaintiffs' purported "common sense" exception to lex loci is not meaningfully explained. Nor do Plaintiffs specify what, if anything, is purportedly included within their reference to "other exceptions to the principle of lex loci delicti." ¶ 138.

D. Count X (Wrongful Death)

Plaintiffs present claims on behalf of some Plaintiffs who are spouses, children, or parents of other Plaintiffs whose death was proximately caused by the Guatemala Study. Plaintiffs state the cause of action "arises under Maryland law." ¶ 201. The Court finds that Plaintiffs cannot assert claims based on Maryland law whether decisional or statutory.

As noted above, if the Third Amended Complaint should present a wrongful death type claim under the ATS, it shall be considered in due course.

E. COUNT XX (Punitive Damages)

Count XX presents a general claim for punitive damages. However, every Count that presents claims for which punitive damages may be available²⁰ includes an express claim for punitive damages. Therefore, Count XX is redundant.

²⁰ That is, all Counts except Count I (asserting claims under Guatemala law that does not provide for punitive damages).

V. DEFENDANTS' LIABILITY

The Second Amended Complaint does not adequately plead a plausible claim against any Defendant. However, it will be useful to address the matter preliminarily prior to the filing of the Third Amended Complaint.

A. Corporate Liability

A panel of the Second Circuit recently has held that the current state of the law in that Circuit does not allow for corporate ATS liability. In re Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144 (2d Cir. 2015).²¹ Nevertheless, as observed by the Second Circuit, there "appears to be a growing consensus among our sister circuits that the ATS allows for corporate liability. To date, the other circuits to have considered the issue have all determined that corporate liability is possible under the ATS." Id. at 156 (citing Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014); Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 57 (D.C. Cir. 2011), vacated on other grounds, 527 Fed. App'x 7 (D.C. Cir. 2013); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1021 (7th Cir. 2011), etc.).

²¹ But see the Second Circuit Order denying en banc review, In re Arab Bank, PLC Alien Tort Statute Litig., 822 F.3d 34 (2d Cir. 2016).

The Court will follow the consensus that there can be corporate ATS liability. However, there is an issue whether the extent of corporate liability under the ATS is essentially equivalent to respondeat superior, applying only to corporate action at the entity's decision-making level, or is subject to some different test. The issue was addressed - albeit not resolved - by Judge Posner, speaking for the United States Court of Appeals for the Seventh Circuit in Flomo v. Firestone Nat.

Rubber Co., LLC:

[T]he plaintiffs concede that corporate liability for [violations of customary international law] is limited to cases in which the violations are directed, encouraged, or condoned at the corporate defendant's decisionmaking level. That is analogous to the liability of municipalities under the Monell doctrine, where as we noted recently "a person who wants to impose liability on a municipality for a constitutional tort must show that the tort was committed (that is, authorized or directed) at the policymaking level of government-by the city council, for example, rather than by the police officer who made an illegal arrest." We needn't decide how far corporate vicarious liability for violations of customary international law extends; it's enough that we see no objection to corporate civil liability as circumscribed as the plaintiffs concede.

643 F.3d 1013, 1020-21 (7th Cir. 2011)(quoting Vodak v. City of Chicago, 639 F.3d 738, 747 (7th Cir. 2011)).

The matter will be considered in due course in light of the Third Amended Complaint allegations.

B. Bases for Defendants' Liability

Plaintiffs contend that the Defendants are liable for the Guatemala Study's violation of the law of nations as:

- Perpetrators of the violation,
- Conspirators with a perpetrator, or
- Aiders and abettors of a perpetrator.

These contentions shall be addressed in turn.

1. As Perpetrators

The Second Amended Complaint lacks specific factual allegations adequate to present a claim that the Defendants perpetrated the Guatemala Study torts. There are no more than general conclusory statements that the Defendants "designed, developed [and] participated in" the Guatemala Study, e.g., ¶ 1, or that individuals associated with the Defendants in various capacities had some relationship with entities that had some relationship to the Guatemala Study.

2. As Conspirators

As stated by the Supreme Court:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Twombly, 550 U.S. at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986))(stating that on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"))(other citations omitted).

The entirety of the Second Amended Complaint allegations regarding Defendants' liability as conspirators in regard to the Guatemala Study consists of:

- Under the Guatemala Code "all of the Defendants are liable for their actions in conspiring to, and aiding and abetting, the negligent, reckless, and intentional conduct set forth in this Second Amended Complaint." ¶ 135.
- The Defendants "entered into an agreement and understanding and conspiracy with each other and with non-parties to this lawsuit. . . and engaged in the following understanding, agreement and conspiracy:
 - [Hopkins and Rockefeller] formulated and planned the Guatemala Experiments.
 - [Hopkins and Rockefeller] entered into an agreement or understanding with each other and with non-parties to this lawsuit as part of their ongoing efforts to [benefit]." ¶ 143.
- Repetition of conclusory statements that Defendants were involved in a conspiracy. ¶¶ 144, 152, 153, 159, 160, 169, 170, 178, 179, 186, 187, 193, 194, 211, 212, 216, 221.

The Second Amended Complaint presents no more than did the plaintiff in Ashcroft v. Iqbal, 556 U.S. 662 (2009). To paraphrase Justice Kennedy's statement in Iqbal:

The [Second Amended Complaint] alleges [repeatedly, in conclusory terms] that

[agents of Defendants designed, developed, participated in, approved, encouraged, directed, and aided and abetted] this invidious [Guatemala Study]. These bare assertions, much like the pleading of conspiracy in Twombly, amount to nothing more than a "formulaic recitation of the elements" of a [ATS] claim, 550 U.S., at 555, 127 S. Ct. 1955. . . . As such, the allegations are conclusory and not entitled to be assumed true. Twombly, supra, 550 U.S., at 554-555, 127 S. Ct. 1955. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in Twombly rejected the plaintiffs' express allegation of a "'contract, combination or conspiracy to prevent competitive entry,'" id., at 551, 127 S. Ct. 1955, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

Id. at 680-81 (emphasis added).

3. As Aiders and Abettors

a. Liability Standard

The United States Court of Appeals for the Fourth Circuit has held that the ATS recognizes aiding and abetting liability. Aziz v. Alcolac, Inc., 658 F.3d 388 (4th Cir. 2011). As to the standard for such liability, the Aziz Court stated: "We are persuaded by the Second Circuit's Talisman²² analysis and adopt

²² The Presbyterian Church of Sudan v. Talisman, 582 F.3d 244 (2d Cir. 2009).

it as the law of this circuit." Id. at 398. The Fourth Circuit, therefore, stated:

In sum, keeping in mind the Supreme Court's admonitions in Sosa that we should exercise "great caution" before recognizing causes of action for violations of international law, and that liability should attach only for violations of those international norms that obtain universal acceptance, we hold that for liability to attach under the ATS for aiding and abetting a violation of international law, a defendant must provide substantial assistance with the purpose of facilitating the alleged violation.

Id. at 401 (emphasis added)(citing Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004)).

In 2014, a panel of the United States Court of Appeals for the Ninth Circuit addressed the standard for aider and abettor liability in the context of an ATS claim. The two-judge majority of the panel stated:

Here, we need not decide whether a purpose or knowledge standard applies to aiding and abetting ATS claims. We conclude that the plaintiffs' allegations satisfy the more stringent purpose standard, and therefore state a claim for aiding and abetting slavery.

Doe v. Nestle USA, Inc., 766 F.3d 1013, 1024 (2014).

The third member of the panel, concurring and dissenting, said:

Unlike the majority, I would definitely and unequivocally decide that the purpose standard applies to the pleading of aiding

and abetting liability under the ATS. In other words, Plaintiffs seeking to assert a claim against Defendants on an aiding and abetting theory of liability must allege sufficient facts to state a plausible claim for relief, i.e., that the defendants acted with the purpose of causing the injuries suffered by the Plaintiffs.

Id. at 1029 (Rawlinson, J., concurring in part and dissenting in part)(footnote omitted).

The Court will consider the aider and abettor standard in light of the allegations made in the Third Amended Complaint and the pertinent precedents.

b. Allegations in the Second Amended Complaint

The Second Amended Complaint's allegations regarding aider and abettor liability largely consist of repeating, mantra-like, the words "aided" and "abetted" in conclusory terms. ¶¶ 1, 5, 135, 142, 143, 144, 151, 153, 158, 160, 168, 170, 177, 179, 185, 187, 192, 194, 211 (4 times), 216.

The Second Amended Complaint contains generalized allegations that unspecified individuals committed acts that could relate to an aiding and abetting contention. For example:

- Johns Hopkins and The Rockefeller Foundation, as institutions and by and through their agents, servants, employees, apparent agents and borrowed servants, helped design, support, develop, encourage, and finance, and participated in and benefitted from the Guatemala Experiments, as a continuation and progression of their existing research into venereal disease. As institutions and through their agents, servants, employees, apparent agents, and borrowed servants, and in concert with others, Johns Hopkins and Rockefeller created and designed the Guatemala

Experiments; approved and recommended them for funding; oversaw, monitored, encouraged, directed, and aided and abetted them while they were ongoing; and helped conceal their unethical, immoral, and tortious nature. ¶ 5 (footnotes omitted).

- The predecessors of Bristol-Myers Squibb, as institutions and through their agents, servants, employees, apparent agents, and borrowed servants, knew of the secret, non-consensual, non-therapeutic studies being planned for in Guatemala. They participated in critical meetings that shaped the Experiments. They decided to use the Experiments as a continuation and progression of their existing research into penicillin, to test various forms of penicillin that they had manufactured and their efficacy on a large population of controlled human subjects. They supplied penicillin in various forms for use in the negligently and unethically designed Experiments, and were made aware of the study results in order that they might better manufacture and market for profit various forms of the drug for use in treating and/or preventing syphilis. They, through their agents, servants, employees and apparent agents, also helped to conceal the unethical, immoral, and tortious nature of the Experiments. ¶ 7.

To the extent that the Second Amended Complaint makes allegations regarding specific actions of identified individuals with respect to aiding and abetting the perpetrators of the Guatemala Study, the statements are collective and conclusory. For example:

- Drs. Moore, Turner, Eagle, Reed, Weed, Parran, Soper, Dyer, Wintersteiner, Rake, and other agents of the Defendants, purposefully designed and implemented the Experiments. ¶ 112.

The Second Amended Complaint does not adequately plead facts presenting a plausible claim of liability against any of the Defendants.

VI. CONCLUSION

For the foregoing reasons:

1. Defendants' Motion Under Federal Rules of Civil Procedure 12(b)(1) and (6) to Dismiss The Second Amended Complaint [ECF No. 107] is GRANTED.
2. The Second Amended Complaint is dismissed.
3. By October 14, 2016,²³ Plaintiffs may file a Third Amended Complaint asserting claims under the law of Guatemala and the Alien Tort Statute consistent with this decision.
4. The Third Amended Complaint shall present adequate specific "foundational" allegations regarding particular Plaintiffs consistent with the instant decision.²⁴
 - a. As to not less than one Direct Plaintiff, at least:
 - i. Identification of the disease on which the claim is based.
 - ii. When and how (diagnosis or otherwise) the Plaintiff became aware that he/she had the disease.
 - iii. Allegations to present a plausible claim that the disease was caused by the Guatemala Study.
 - b. As to not less than one Spouse, including at least:
 - i. Identification of the disease on which the claim is based.
 - ii. When and how (diagnosis or otherwise) the Spouse became aware that he/she had the disease.
 - iii. Allegations to present a plausible claim that:
 1. The disease was transmitted to the Spouse by a Direct Plaintiff.

²³ Or such other date as may be set by further Order.

²⁴ The Court is not herein stating that the enumerated examples of allegations are all that would be necessary.

2. The disease was caused in the Direct Plaintiff by the Guatemala Study.
- c. As to not less than one first generation Descendant Plaintiff (child of a Direct Plaintiff), including at least:
- i. Identification of the disease on which the claim is based.
 - ii. When the Plaintiff was born with the disease.
 - iii. When and how (diagnosis or otherwise) the Plaintiff became aware that he/she had the disease.
 - iv. Factual allegations to present a plausible claim that:
 1. The mother of the Plaintiff was a Direct Plaintiff or was infected with the disease by a Direct Plaintiff.
 2. The mother of the Plaintiff transmitted the disease to the Plaintiff.
 3. The disease was caused in the pertinent Direct Plaintiff by the Guatemala Study.
- d. As to not less than one second or later generation Plaintiff (grandchild, great-grandchild, etc. of a Direct Plaintiff), including at least:
- i. Identification of the disease on which the claim is based.
 - ii. When the Plaintiff was born with the disease.
 - iii. When and how (diagnosis or otherwise) the Plaintiff became aware he/she had the disease.
 - iv. Factual allegations, as set forth regarding a child Plaintiff, to establish that the disease originated with a Direct Plaintiff and was

transmitted through the generations to the Plaintiff.

- e. As to not less than one Wrongful Death Claimant:
 - i. The decedent upon whom the claim is based.
 - ii. The date of death of the decedent.
 - iii. Identification of the disease that caused death of the decedent and factual allegations to establish causation.
 - iv. Factual allegations to establish that the disease causing the death of the decedent originated with a Direct Plaintiff, was caused by the Guatemala Study and, if the Direct Plaintiff is not the pertinent decedent, was transmitted from the Direct Plaintiff to that decedent.

SO ORDERED, on Wednesday, September 7, 2016.

/s/
Marvin J. Garbis
United States District Judge